Supreme Court, U.S.
FILED
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No. 88-98

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA PERKINSON, ELIZABETH PERKINSON, a Minor, by her father and next friend, ALEX PERKINSON, as Administrator of the Estate of ETHEL PERKINSON, Deceased,

Petitioners,

vs.

MONTY MANION, REELFOOT PACKING CO., a Division of VALLEY DALE PACKERS; INTERSTATE PRODUCERS LIVESTOCK ASSOCIATION, a partnership or trade association, and JACK SCOVILLE, d/b/a SCOVILLE'S TAP ROOM,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER CONGRESS INTENDED, OR AS A MATTER OF PUBLIC POLICY THIS COURT SHOULD ALLOW, BUSINESSES WHICH USE UNINSURED INTERSTATE DRIVERS TO ESCAPE RESPONSIBILITY FOR THE INJURIES AND DEATHS CAUSED BY THE FINANCIALLY IRRESPONSIBLE DRIVERS WHICH IT HIRES, CONTRACTS, DISPATCHES OR CONTROLS GIVEN CONGRESS' ENACTMENT OF THE MOTOR CARRIER LIABILITY ACT OF 1980 WHICH REQUIRES FOR-HIRE MOTOR CARRIERS TO MAINTAIN MINIMUM LEVELS OF LIABILITY INSURANCE IN ORDER TO PROTECT THE PUBLIC?

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Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Circuit Court for the Third Judicial Circuit, Madison County, Illinois, granted Summary Judgment in favor of Defendant INTERSTATE PRODUCERS LIVESTOCK ASSOCIATION and against Plaintiff (Appeal No. 5-86-0628), and denied Defendant REELFOOT PACKING COMPANY, a Division of Valley Dale Packers' Motion for Summary Judgment (Appeal No. 5-86-0628). Plaintiffs and Defendant

REELFOOT separately appealed the decisions of the Circuit Court to the Appellate Court of Illinois, Fifth District. After consolidating the appeals, the Appellate Court affirmed the decision of the Circuit Court below granting Defendant INTERSTATE PRODUCERS LIVESTOCK ASSOCIATION'S Motion for Summary Judgment and reversed the decision of the Circuit Court denying Defendant REELFOOT PACKING COMPANY's Motion for Summary Judgment. (The opinion of the Appellate Court of Illinois, Fifth District, is reprinted in the Appendix to this Petition). Leave to appeal to the Supreme Court of Illinois was denied.

JURISDICTION

The Judgment of the Appellate Court of Illinois, Fifth District, was entered on December 2, 1987. An Affidavit of Intent to Seek Review was filed on December 21, 1987, in the Appellate Court. The Supreme Court of Illinois denied the Petition for Leave to Appeal on April 7, 1988. This Court's jurisdiction is invoked under 28 U.S.C., § 1257(3).

REGULATIONS, STATUTES, ETC., INVOLVED

49 U.S.C. § 10927

> "(a)(1) The Interstate Commerce Commission may issue a certificate or permit to a motor carrier under § 10922 or 10923 of this title and a certificate of registration to a motor carrier or motor private carrier under section 10530 of this title only if the carrier files with the Commission a bond, insurance policy, or other type of security approved by the Commission, in an amount not less than such amount as the Secretary of Transportation prescribes pursuant to, or as is required by, the provisions of § 30 the Motor Carrier Act of 1980, in the case of a motor carrier of property, § 18 of the Bus Regulatory Reform Act of 1982, in the case of a motor carrier of passengers, or the laws of

the State or States in which the carrier is operating, in the case of a motor private carrier. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the carrier for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles under the certificate or permit, or for loss or damage to property (except property referred to in paragraph (3) of this subsection), or both. A certificate or permit remains in effect only as long as the carrier satisfies the requirements of this paragraph."

Pub.L 96-296, 96 Stat. 2158 (Uncodified); § 30(a)(1) of Motor Carrier Act of 1980

"(a)(1) The Secretary of Transportation shall establish regulations to require minimal levels of financial responsibility sufficent to satisfy liability amounts to be determined by the Secretary covering public liability, property damage, and environmental restoration for the transportation of property for hire by motor vehicle in the United States from a place in one State to a place in another State, from a place in a State to another place in such State through a place outside of such State, or between a place in a State and a place outside the United States."

49 C.F.R. § 387.1

Purpose and Scope.

"This part prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways."

49 C.F.R. § 387.3

Applicability.

"(a) This part applies to for-hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce."

49 C.F.R. § 387.7

"(a) No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsiblity as set forth in § 387.9 of this part."

49 C.F.R. § 387.9

"The minimum levels of financial responsibility referred to in § 387.7 of this part are hereby prescribed as follows:

SCHEDULE OF LIMITS—PUBLIC LIABILITY

[Freight Vehicles With Gross Vehicle Weight Rating of 10,000 Pounds or More]

Type of carriage	Commodity transported	Combined single limit (CSL)	
		July 1, 1981	July 1, 1983
(1) For-hire (in interstate or foreign commerce).	Property (non-hazardous)	$500,000	$750,000
(2) For-hire and private (in interstate or intrastate commerce).	Hazardous substances, as defined in 49 CFR 171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or in bulk Class A and B explosives, poison gas (Poison A), liquefied compressed gas, or compressed gas; or large quantity radioactive materials as defined in 49 CFR 173.389.	1,000,000	5,000,000
(3) For-hire and private (in interstate commerce; in any quantity) (in intrastate commerce, in bulk only).	Oil listed in 49 CFR 172.101, hazardous waste, hazardous materials and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned in (2) above.	500,000	1,000,000

STATEMENT OF THE CASE

On January 13, 1983, a truck being driven by Defendant MONTY MANION struck an automobile containing BRENDA PERKINSON, ELIZABETH PERKINSON, and ETHEL PERKINSON. Brenda and Elizabeth Perkinson received severe and permanent injuries from the accident, including brain damage and the loss of an ear. Ethel Perkinson ultimately died as a result of the injuries she received in the accident.

Earlier that day, an employee of Defendant, ILLINOIS LIVESTOCK PRODUCER'S ASSOCIATION (hereinafter "IPLA") spoke with Defendant MANION and directed him to travel to Bluffs, Illinois, to pick up a truckload of hogs for transport. (C-487, 488). The truckload of hogs were to be taken by Defendant MANION to the stockyards of Defendant REELFOOT PACKING COMPANY (hereinafter "REELFOOT".) IPLA and REELFOOT have maintained a business relationship concerning the sale and purchase of livestock for over 25 years (C-477).

REELFOOT is a packing company that processes approximately 3500 hogs a day at its Union City Plant in Tennessee. (C-419). REELFOOT is a division of Valleydale Packers which processes pork and beef. (C-411, 412). On a daily basis, REELFOOT acquires hogs for slaughter from livestock dealers, auction companies, terminal markets, and farmers, at different spots all over the nation. (C-412). Valleydale has a fleet of around 200 trucks which are used to transport their finished products (C 414, 415). REELFOOT receives between ten and fifteen truckloads of hogs per day (C-420). REELFOOT would purchase three to four loads (190 hogs per load) per week from IPLA (C-413). MANION had hauled hogs to REELFOOT as many as thirty times for a year and a half period of time before the accident (C-417, 418, 425). During that period, he would haul hogs from various producers, including IPLA. Commonly, drivers call REELFOOT on an 800 number, then an employee of REELFOOT tells them whether or not there is a load of hogs

to be picked up. A REELFOOT employee tells the trucker where the load is to be picked up and what time it is to be delivered. (C-428, 432). Sometimes REELFOOT pays the truckers, sometimes the trucking fee is added to the invoice of the seller. (C-445). REELFOOT makes sure that truckers it uses maintain cargo insurance in order to insure against the risk of loss of hogs on the load, but not liability insurance. REELFOOT has a copy of MANION's policy on file at its office.

IPLA is a cooperative association which purchases and sells livestock from farmers (C-346-348). IPLA operates in Illinois, Iowa and Missouri, and is involved in the purchase and sale of hogs, cattle and sheep. (C-346, 348). IPLA owns 32 stockyards in Illinois alone (C-350). IPLA does about a "million dollars a day worth of business." (C-352). Out of the Bluff, Illinois facility alone around 30,000 hogs are sold per year (C-354).

Generally, packing houses order hogs from IPLA in the morning. Orders are met by purchases from local farmers. Sometimes an employee of IPLA calls packing houses like REELFOOT and arranges a purchase and sale; sometimes the packing house calls IPLA to place an order. IPLA arranges for shipping to packing houses at the request of the buyer (C-377). IPLA claims to use only certain truckers when it arranges for transportation (C-379). The day of the accident, Defendant MANION spoke with an employee of IPLA and was told to pick up the REELFOOT load in Bluffs, Illinois (C-394). IPLA issued a bill of lading for the load of hogs to be transported by MANION and indicated that REELFOOT's arrangement for transport was by "own truck" (C-441).

MANION's trip began in Pevely, Missouri where he called Charles Nolan of REELFOOT, as was his custom, to see whether there was a load for him. (C-496). Nolan informed him that there was a load for him at IPLA. MANION then went to SCOVILLE's CAFE in the East St. Louis, Illinois area, at around 12:00 Noon, where he began drinking. At 2:30 p.m.,

MANION called IPLA and was told to go to Bluff to pick up the load. (C-483). MANION left SCOVILLE's at around 8:30 p.m that evening on his way to Bluff when the fatal accident occurred. At the time of the accident, MANION did not carry liability insurance.

During his deposition MANION was asked what sort of work he was doing from December of 1982 up until the accident. He replied that he was hauling hogs for REELFOOT PACKING HOUSE (C-482). When asked who he was working for, MANION replied that he was working for REELFOOT. He was asked, "Do you know for sure who you are working for?" He replied, "Well, REELFOOT gives me my checks so I guess I work for REELFOOT." (C-508).

Plaintiffs filed an action against IPLA, REELFOOT, MANION and SCOVILLE'S CAFE. The theory of liability on the part of Defendants REELFOOT and IPLA was based in part on either an employer/employee or agent/principle relationship, or upon a duty imposed by the Motor Vehicle Act of 1980 or other Interstate Commerce Commission Rules and Regulations which require minimum levels of liability insurance.

Both REELFOOT and IPLA filed Motions for Summary Judgment after discovery had been taken on the issues of the agency relationship and responsibility under the Motor Vehicle Act of 1980. The trial court entered a judgment granting IPLA's Motion for Summary Judgment and denying Defendant REELFOOT's Motion for Summary Judgment, holding that a question of fact remained as to Defendant REELFOOT's relationship to Defendant MANION. Plaintiffs appealed the Order granting Summary Judgment for IPLA, and REELFOOT appealed the Order denying their Motion for Summary Judgment. After consolidating the Appeals, the Appellate Court for the Fifth District affirmed the Trial Court's decision as to IPLA and reversed the decision as to Defendant REELFOOT. The Supreme Court of Illinois denied the Plaintiffs' Petition for Leave to Appeal.

REASON FOR GRANTING WRIT

Congress Enacted The Motor Carrier Liability Act of 1980 Which Requires For-Hire Motor Carriers To Maintain Minimum Levels Of Liability Insurance In Order To Protect The Public. Congress Did Not Intend Nor Should This Court Allow, Businesses Which Use Uninsured Interstate Drivers To Escape Responsibility For The Injuries And Deaths Caused By The Financially Irresponsible Drivers Which It Hires, Contracts, Dispatches Or Controls.

In 1980, Congress passed and the President signed, the Motor Carrier Act of 1980. The Motor Carrier Act of 1980 prescribes that minimum levels of financial responsibility be set for for-hire motor carriers of property involved in interstate or foreign transportation. The purpose of the Act was to create incentives for safer driving with respect to highway transportation. The goals of the Act were to prevent tragedies, like the one involved in the case at bar, from occurring.

In the present case, Defendant MANION, who carried no liability insurance, was dispatched to Bluff, Illinois, to pick up a load of hogs for transport. On the way to Bluff his truck smashed into the back of Plaintiffs' vehicle, killing one passenger and severely injuring two others. The two entities which hired, dispatched, or otherwise controlled MANION seek to escape responsibility by claiming in essence that MANION was not their employee.

REELFOOT is a major packing house which is a division of Valleydale Packers, one of the largest packers in the nation. The REELFOOT Plant itself processes around 3500 hogs per day. Typically, REELFOOT makes its purchases of livestock over the phone and arranges for daily transportation of livestock to its plant. Each day REELFOOT has ten to fifteen deliveries by truck to its Union City Plant.

IPLA is a large livestock cooperative operating in Illinois, Iowa and Missouri. In Illinois alone, IPLA has thirty-two (32)

facilities where livestock are kept. Typically IPLA arranges its sales over the phone. Farmers who are members of the co-op, bring their animals to the various sites. IPLA arranges their sales and often the transportation via truck to the various purchasers of the livestock.

For both REELFOOT and IPLA, the use of interstate trucking is an integral part of their businesses. This certainly is not an isolated instance where a farmer hires a trucker to bring his pig to market. Each seeks to escape responsibility for the acts of a trucker whose services they engaged because they hired an independent trucker instead of using their own truck lines. The Motor Carrier Act of 1980 would be completely circumvented if such is the case. If commercial entities whose businesses are so intimately tied to interstate trucking are to have no responsibility to ensure that drivers they hire carry minimum levels of liability insurance, then the Act will be rendered meaningless by the random hiring of irresponsible drivers. See *Toomer v. United Resin Adhesives, Inc.*, 65 F.Supp. 219 (N.D.Ill. 1986) holding that a carrier lessee cannot evade its responsibility to the public under Revised Interstate Commerce Act by obtaining trucks through leasing arrangements rather than ownership and employment of drivers.

Businesses who regularly utilize interstate truckers like the one involved herein, are in a better position to, at the very least, require that its drivers provide proof of adequate liability insurance before engaging their services. REELFOOT and IPLA both require truckers it hires to provide proof of cargo insurance in order to protect the livestock it carries. It would be no more trouble for such business to require that truckers provide proof of liability insurance in order to protect human beings who are injured as a result of the acts of their truckers.

The purpose of the Act and its accompanying regulations is to protect the general public from the hazards of the shared use of the nation's highways with truckers. Businesses like REELFOOT and IPLA reap the benefits of highway transpor-

tation of their products and raw materials. Requiring them to inquire about or provide liability insurance for truckers which it engages is a small price to pay in light of the benefits which they reap and the lives that may be saved.

Illinois courts have recognized the public policy concerns which are involved in the ICC regulations. This Court in *Kreider v. Augustine,* 76 Ill.2d 535, 394 N.E.2d 1179 (1979) held that in order to protect the public from the dangers of highway trucking, that carriers whose names and ICC numbers are printed on trucks remain responsible for accidents which occur involving those trucks, regardless of the use and ownership of the truck involved.

In *Hershberger v. Home,* 103 Ill.App.3d 348, 431 N.E.2d 72 (2nd Dist. 1982), the court addressed the public policy issues involved in the ICC regulations concerning minimum levels of financial responsibility for truckers and the issue of vicarious liability for independent truckers. The court stated, ". . . the main thrust of the regulations is to prevent licensed carriers from escaping liability to injured members of the public by claiming their lessor drivers were independent contractors rather than employees." *Id.* at p. 74. The court further stated:

> "The primary goals of the ICC regulation which imposes responsibility on a carrier are (1) to prevent ICC carriers from avoiding safety standards imposed ty the ICC by the simple practice of leasing equipment from non-regulated carriers; (2) to promote highway safety by insuring that drivers furnished by exempt carriers as part of the leased equipment; and (3) *to provide shippers and other members of the public with financially responsible carriers.*" (emphasis supplied.)

Id. at 75. See also *Indiana Refrigerator Lines, Inc. v. Dalton,* 516 F.2d 795 (6th Cir., 1975). It is the danger that truckers present to the public in *Kreider* and *Hershberger* which concerns Illinois courts, and not the precise relationship of the parties.

Therefore, in order to protect the public at large and to give meaning to an Act of Congress, it is essential that the Court look past the efforts of REELFOOT and IPLA to deny responsibility and instead impose a duty upon businesses who engage the services of interstate truckers to provide for or require proof of minimum levels of liability insurance.

CONCLUSION

In order to protect the public and to promote the intent of Congress pursuant to the Motor Carrier Act of 1980, it is necessary that businesses which use interstate trucking have a duty to require or provide for minimum levels of liability insurance for drivers which it hires.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant their Petition for Writ of Certiorari so that the decision of the Appellate Court might be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

ILLINOIS SUPREME COURT
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706

Mr. Richard Shaikewitz
Wiseman, Shaikewitz, McGivern
P.O. Box 438
Alton, IL 62002-0438

No. 66375 - Brenda Perkinson, et al., etc., petitioners, v. Monty Manion, et al., etc., respondents. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 29, 1988.

IN THE CIRCUIT COURT THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS
FILED: SEPTEMBER 2, 1986

PERKINSON, *et al*,
Plaintiffs,
v.
MANION, *et al*,
Defendants.

No. 83-L-566

ORDER

This Cause comes on for hearing upon a Motion For Summary Judgment having been filed by Attorney Lamb on behalf of the Defendant, Interstate Livestock Producers Association, and upon a Motion For Summary Judgment filed by Attorney Scott on behalf of Reelfoot Packing.

The Court has heretofore heard oral argument from the parties with respect to each of the motions. The Court has also received memoranda in support of the motions from each of the parties, as well as counter memoranda from Plaintiff's counsel, Beth Walston.

The Court has received the memoranda and has looked at the precedents supplied in the memoranda. The Court has further reviewed the depositions of Messrs. Manion, Nolan, and Salmon. After reviewing all of the matters listed above, the Court does hereby rule as follows:

1. As to the Motion for Summary Judgment by Interstate Livestock Producers Association, which refers specifically to Counts XI through XX of the Second Amended Complaint. The Court finds that three theories of potential liability are being expressed by the Plaintiff in those Counts. The three theories are:

a) I.L.P.A. was the employer of Monty Manion and as such was responsible for his negligence. The undisputed facts do not support that premise.

b) Monty Manion was the agent of a joint venture action between I.L.P.A. and Reelfoot Packing — Again, the undisputed facts do not support that premise.

c) The I.L.P.A. is potentially responsible because of the Interstate Commerce Commission regulations imposing a duty upon I.L.P.A. to make sure that all people who pick up hogs from one of their locations, has insurance to protect the general public should that person then injure some other party — Again, the undisputed facts do not support this premise and the Court finds there is such legal duty imposed on I.L.P.A.

The Motion For Summary Judgment should be allowed as to Interstate Livestock Producers Association because they did not contract with, control or supervise Monty Manion, not did they have an obligation under the regulations of the Interstate Commerce Commission to make sure the Monty Manion, who was hired by Reelfoot Packing, was an insured motorist. The Court further finds that there is absolutely no evidence that there existed any joint venture between I.L.P.A. and Reelfoot. Summary Judgment is granted as to Counts XI through XX in favor of I.L.P.A. and against the Plaintiffs and there exists no reason why this matter should not be appealed.

2. As to the Defendant, Reelfoot Packing Company, the Court finds that there are two theories of potential liability set forth. They are:

a) Reelfoot was the employer of Monty Manion and as a result of that employer-employee relationship, there existed a duty on the part of Reelfoot to make certain that Monty Manion was insured. If he was not, there was liability by Reelfoot if Monty Manion was negligent to another motorist.

b) That Reelfoot Packing was responsible by virtue of its employer-employee relationship with Manion, under the rules and regulations promulgated by the Interstate Commerce Commission with respect to mandatory insurance coverage.

The Motion For Summary Judgment should be allowed as to the second theory based upon the agency relationship and the imposition of Commerce Commission standards. Summary Judgment is entered in favor of the Defendant Reelfoot, and against the Plaintiffs as to Counts XXIII through XXVII. There exists no factual dispute as to these counts and the Court feels that the regulations of the Interstate Commerce Commission, as cited by Plaintiff in its Counts, does not apply to the Defendant, Reelfoot, under the undisputed facts in this cause, and there exists no reason this matter should not be appealed.

As to the general agency theory as expressed in Counts VI, VII, VIII, IX, and X, the Court denies the Motion For Summary Judgment and feels that there exists genuine factual disputes which need to be resolved by the trial of fact.

Copies of this Order should be sent to Counsel of record.

ENTERED: 9-2-86

/s/ PAUL E. RILEY
Associate Judge

IN THE APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 5-86-0628
No. 5-86-0685
Consolidated

Filed December 2, 1987

Brenda Perkinson, Elizabeth Perkinson, a minor, by her father and next friend, Alex Perkinson; and Alex Perkinson, Administrator of the Estate of Ethel Perkinson, Deceased,

Plaintiffs-Appellants,

v.

Monty Manion, Reelfoot Packing Co., A Division of Valley Dale Packers; Interstate Producers Livestock Association, and Jack Scoville, d/b/a Scoville's Tap Room,

Defendants-Appellees.

Appeal from the Circuit Court of Madison County.

No. 5-86-0628

No. 83-L-566

Honorable Paul E. Riley, Judge Presiding.

Brenda Perkinson, Elizabeth Perkinson, a minor, by her father and next friend, Alex Perkinson; and Alex Perkinson, Administrator of the Estate of Ethel Perkinson, Deceased,

Plaintiffs-Appellants,

v.

Monty Manion, Reelfoot Packing Co., A Division of Valley Dale Packers; Interstate Producers Livestock Association, and Jack Scoville, d/b/a Scoville's Tap Room,

Defendants-Appellees.

Appeal from the Circuit Court of Madison County.

No. 5-86-0628

No. 83-L-566

Honorable Paul E. Riley, Judge Presiding.

JUSTICE WELCH delivered the opinion of the court:

The plaintiffs in this personal injury and wrongful death action are Brenda Perkinson, Elizabeth Perkinson, a minor, by her father and next friend Alex Perkinson, and Alex Perkinson as administrator of the estate of Ethel Perkinson. The defendants are Monty Manion ("Manion"), Reelfoot Packing Company, a division of Valley Dale Packers ("Reelfoot"), Interstate Producers Livestock Association ("the Association"), and Jack Scoville, doing business as Scoville's Tap Room ("Scoville's). Plaintiffs appeal from the partial summary judgment of the circuit court of Madison County in favor of the Association. Reelfoot appeals from the circuit court's refusal of summary judgment in Reelfoot's favor. Scoville's and Manion are not parties to these interlocutory appeals, which this court consolidated for oral argument and opinion.

Plaintiffs' most recent complaint alleged Brenda, Elizabeth and Ethel Perkinson were passengers in a motor vehicle which collided with a tractor-trailer rig owned and driven by Manion. Manion had no liability insurance on the tractor-trailer at the time of the collision. Manion's trip originated when he left his home and drove to Scoville's in National City. There, he telephoned Reelfoot, as was his custom, to inform Reelfoot purchasing agent Charles Nolan that he was in the area and to inquire whether any work was available. Nolan told Manion to telephone the Association for the location of a load to be transported to Reelfoot's plant. An employee of the Association at the Association's main office in Peoria told Manion the load was at the Association's Bluffs, Illinois facility. Manion

was en route to Bluffs to pick up the hogs when the collision occurred.

In the counts in question on plaintiffs' appeal, plaintiffs alleged that at the time of the collision (1) Manion was the agent, employee or servant of the Association; (2) the Association was involved in a joint venture with Reelfoot; and (3) the Association violated Interstate Commerce Commission Rules and Regulations requiring minimum levels of liability insurance. It was upon these allegations that the circuit court entered summary judgment in favor of the Association. In the counts in question in Reelfoot's appeal, plaintiffs alleged Manion was Reelfoot's agent. The circuit court denied Reelfoot's motion for summary judgment upon those counts.

The motions for summary judgment were submitted to the circuit court on the basis of the depositions of Manion, Nolan and Association employee Max Salmon. The pertinent facts are not in dispute in light of that testimony: The Association dispatched loads from various locations. Manion was not told the destination of the hogs on this occasion but knew it would be Reelfoot's facility in Union City, Tennessee. Manion made one or two hauls a week to Reelfoot's plant for Reelfoot. On occasion Manion also brought loads to the Reelfoot facility when a hog seller hired Manion instead of Reelfoot. On those occasions the seller paid Manion and billed Reelfoot for the hogs, the seller's commission and shipping. After the accident Reelfoot no longer used Manion but sellers of hogs continued to use Manion to transport loads to Reelfoot's plant. Reelfoot received all its incoming hogs by tractor-trailer or truck but owned no livestock transport vehicles of its own. Reelfoot received about 10 to 15 trailer loads of hogs each day from various sellers located up to an 18-hour drive from the Reelfoot plant. Reelfoot bought an average of three or four loads a week from the Association. Reelfoot reserved the right to reject deliveries of nonconforming livestock. Reelfoot paid Manion by check after delivery according to the weight of the hogs haul-

ed. Manion had hauled for Reelfoot for about a year to a year and a half at the time of the accident. Manion also hauled for other firms. Reelfoot had at its office a copy of a policy of cargo insurance issued for Manion, provided by Hartford Insurance to Reelfoot. Reelfoot's policy was that Reelfoot and the driver each bore half the risk of the first dead hog, and thereafter dead hogs were the driver's responsibility. When Manion first sought work from Reelfoot Nolan told him Reelfoot needed a copy of Manion's cargo insurance on file before Reelfoot could use him. The only business name on Manion's tractor-trailer was Manion's. Manion bought his own fuel and permits and did not maintain a log for Reelfoot. Reelfoot instructed Manion as to the day and time the hogs were to be delivered. The Association was an agricultural cooperative which bought hogs from farmers and sold the hogs to slaughterhouses. The Association maintained 32 stockyards in Illinois. The Association bought hogs from farmers and sold to buyers including Reelfoot. On this particular occasion the buyer-seller agreement required Reelfoot to arrange transportation, and the Association had no control over who Reelfoot retained to transport the hogs. This was not always the case; when the agreement with Reelfoot or some other buyer called for the Association to arrange transportation the Association obtained a tractor-trailer and driver, but the Association did not use Manion. The business relationship between Reelfoot and the Association was of more than 25 years' duration.

We first consider plaintiffs' appeal. The first issue is whether the trial court correctly determined Manion was not an agent of the Association as a matter of law. Summary judgment should be rendered without delay it the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Ill.Rev.Stat. 1985, ch. 110, par. 2-1005(c).) The general rule is that a party injured by the negligence of another must seek his remedy against the person who caused his injury. An exception

is the doctrine of *respondeat superior*. (See *Metzler v. Layton* (1940), 373 Ill. 88, 91, 25 N.E.2d 60, 61.) Whether the relationship of principle and agent or owner and independent contractor exists is a question of fact for the jury unless the relationship is so clear as to be indisputable. *Yahas v. Allis-Chalmers Distirb. Serv. Corp.* (1973), 12 Ill.App.3d 814, 821, 299 N.E.2d 166, 170.

The existence of either relationship depends upon such facts as the matter of hiring, right to discharge, manner and direction of servants, right to terminate the relationship and the character of the supervision of the work done. Unless those facts clearly appear, the question of existence of the relationship cannot be one of law. *(Tansey v. Robinson* (1960), 24 Ill.App.2d 227, 234, 164 N.E.2d 272, 275.) An independent contractor has been defined as one who renders service in the course of an occupation and represents the will of the person for whom the work is done only with respect to the result and not the means by which that result is accomplished. It has also been said that if the person for whom the service is rendered retains the right to control the details of the work and the method or manner of its performance, the relationship of employee and employer exists. The right to control the manner of doing the work is an important if not the principal consideration which determines whether the worker is an employee or an independent contractor. *Trzaska v. Bigane* (1945), 325 Ill.App.3d 528, 535, 60 N.E.2d 264, 267.) In this case it is undisputed that it was Reelfoot, not the Association, which hired Manion. The Association had no control over whom Reelfoot sent to take possession of the hogs and had no authority to tell Manion how to do the job or to refuse to deal with him. In *Cable v. Perkins* (1984), 121 Ill.App.3d 127, 459 N.E.2d 275, the appellate court concluded a newspaper delivery driver was an independent contractor as a matter of law though the company has a written contract with the deliverer, paid the deliverer a rate based on the number of customers and the mileage, handled complaints against the deliverer and could terminate the relationship. In *Cable* the appellate court relied

on the similar case *Manahan v. Daily News-Tribune* (1977), 50 Ill.App.3d 9, 365 N.E.2d 1045, which also involved a newspaper deliverer and in which the court also held the deliverer was an independent contractor as a matter of law. In *Trzaska v. Bigane*, the appellate court concluded a coal delivery driver the owner had used for 20 years was an independent contractor as a matter of law though the driver's vehicle bore the coal business' sign and the driver regularly hauled for the business and collected its money. There is no more relevant connection between Manion and the Association in the instant case than was present in *Cable*, *Manahan* and *Trzaska*. There is no more question of fact that Manion was an agent of the Association than was present in those cases. We conclude the trial court properly held Manion was not the Association's agent under the instant facts.

We turn to plaintiffs' contention that the Association and Reelfoot were engaged in a joint venture at the time of the accident. A joint venture is an association of two or more entities to carry out a single enterprise for profit. There must be a community of interest in the performance of the common purpose, a proprietary interest in the subject matter, a right to direct and govern the policy, and a right to joint control. *(Swap Shop, Inc. v. M & R Amusement Corp.* (1981), 102 Ill.App.3d 926, 931, 430 N.E.2d 499, 503.) Despite the long period of trade between Reelfoot and the Association, the uncontradicted evidence establishes no more than a buyer-seller relationship. There was no joint interest in the subject matter. Regardless of when ownership of a livestock shipment transferred, at that point the Association's ownership ceased and Reelfoot's ownership commenced. That the two communicated with each other and the drivers in a form of shorthand is attriburable to the duration and volume of trade between this buyer and seller and other buyers and sellers in the industry. The trial judge correctly determined no joint venture existed as a matter of law on these facts.

Plaintiffs argue a question of fact existed as to whether the Association was liable under interstate commerce regulations

imposing liability for failure to maintain liability insurance or to require its drivers to maintain liability insurance. Plaintiffs argue these regulations apply to the Association because (1) Manion was the Association's agent; (2) Manion was an agent of the Reelfoot-Association joint venture; or (3) as a matter of public policy, the Association was "in the best position to enforce ICC regulations through appropriate requirements of the drivers it hires." Our conclusions on the issues of agency and joint ventureship dispose of these contentions. If Manion was not an agent of the Association or an agent of a joint venture including the Association and the Association did not hire Manion and had no authority to refuse to deal with him in the instant situation, then the Association was in no position to enforce Manion's compliance with Interstate Commerce regulations.

We turn to Reelfoot's appeal. Reelfoot contends the trial court erred in refusing to hold that as a matter of law manion was not Reelfoot's agent. *Cable, Manahan* and *Trzaska* demonstrate that as a matter of law obtaining a delivery driver who supplies his own truck is not alone sufficent to establish an employer-employee or principal-agent relationship. The next inquiry is whether the trial court would be justified on this record in submitting to the jury the question whether anything more than the relationships described in *Cable, Manahan* and *Trzaska* appears here. The answer is that the relationship between Manion and Reelfoot is similar to the relationships in those cases. The facts plaintiffs assert to show Nolan's familiarity with Manion show little other than that the relationship between the two was of some duration. That Nolan called the drivers "his" was of no legal significance. That the Association's bill of lading designated the method of transportation as "own truck" was of no effect as to the relationship between Manion and Reelfoot; it indicated only that the truck to be used was not the Association's. That Reelfoot had the right to cease dealing with Manion states no more than is true between any

owner and independent contractor. None of those facts distinguish this case from *Cable, Manahan* or *Trzaska* or afford any basis for concluding Reelfoot exercised control over the manner or method of work as opposed to the mere result. Though Reelfoot kept a copy of Manion's cargo insurance sheet on file, a fact not present in *Cable* or *Manahan* or *Trzaska,* this fact represents no control by Reelfoot over the manner or method of Manion's work.

The summary judgment of the circuit court of Madison County in favor of the Association and against plaintiffs is affirmed. The order in favor of plaintiffs against Reelfoot upon Reelfoot's motion for summary judgment is reversed and this cause is remanded to the circuit court of Madison County for further proceedings.

No. 5-86-0628 AFFIRMED.

No. 5-86-0685 REVERSED AND REMANDED.

KARNS, P.J. and HARRISON, J., CONCUR.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

Brenda Perkinson, Elizabeth Perkinson, a minor, by her father and next friend, Alex Perkinson; and Alex Perkinson, Administrator of the Estate of Ethel Perkinson, Deceased,
Petitioners,

v.

Monty Manion, Reelfoot Packing Co., A Division of Valley Dale Packers; Interstate Producers Livestock Association, and Jack Scoville, d/b/a Scoville's Tap Room,
Respondents.

PROOF OF SERVICE

STATE OF ILLINOIS)
)ss
COUNTY OF MADISON)

The undersigned, an employee of the Law Firm of WISEMAN, SHAIKEWITZ, MC GIVERN, WAHL, FLAVIN & HESI, P. C., being first duly sworn, upon oath, state that I personally mailed true and correct copies of the Petition for Writ of Certiorari by placing the same in an envelope clearly addressed and with sufficient postage, in the U. S. Mail Box in front of 620 East Third Street, Alton, Illinois, at 5:00 p.m., to Madelyn Lamb, Attorney at Law, P. O. Box 510, Edwardsville, Illinois 62025, Russell Scott and Edward L. Adelman, Attorneys at Law, 208 N. High, Belleville, Illinois, Michael Katz, Attorney at Law, 1933 Vandalia, Collinsville, Illinois 62234, and Michael Constance, Attorney at Law, 201 South Illinois, Belleville, Illinois 62220, on this 1st day of July, 1988.

/s/ Richard Shaikewitz

Subscribed and sworn to before me, a Notary Public, in and for the State of Illinois, County of Madison, this 1st day of July A.D., 1988.

/s/ Virginia L. Pratt
NOTARY PUBLIC

(2)

Supreme Court, U.S.
FILED
AUG 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-98

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA PERKINSON, ELIZABETH PERKINSON, A MINOR, by her father and next friend, ALEX PERKINSON, as Administrator of the Estate of Ethel Perkinson, Deceased,

Petitioners,

VS.

MONTY MANION, REELFOOT PACKING CO., a Division of VALLEY DALE PACKERS; INTERSTATE PRODUCERS LIVESTOCK ASSOCIATION, a partnership or trade association, and JACK SCOVILLE, d/b/a SCOVILLE'S TAP ROOM,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE QUESTION PRESENTED BY PLAINTIFFS WAS PROPERLY RAISED SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE JUDGMENT ON WRIT OF CERTIORARI.

II. WHETHER THE INTERSTATE COMMERCE ACT IMPOSES A DUTY UPON A PARTY WHO CONTRACTS WITH A MOTOR CARRIER TO ASSURE MAINTENANCE OF MINIMUM LEVELS OF LIABILITY INSURANCE.

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No. 88-98

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

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On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Circuit Court for the Third Judicial Circuit, Madison County, Illinois, granted Summary Judgment in favor of Defendants INTERSTATE PRODUCERS LIVESTOCK ASSOCIATION and REELFOOT PACKING COMPANY and against Plaintiff (Appeal No. 5-86-0628), and denied Defendant REELFOOT PACKING COMPANY'S Motion for Summary Judgment (Appeal No. 5-86-0628). Plaintiffs and Defendant

REELFOOT separately appealed the decisions of the Circuit Court to the Appellate Court of Illinois, Fifth District. After consolidating the appeals, the Appellate Court affirmed the decision of the Circuit Court below granting Defendants INTERSTATE PRODUCERS LIVESTOCK ASSOCIATION and REELFOOT PACKING COMPANY'S Motions for Summary Judgment and reversed the decision of the Circuit Court denying Defendant REELFOOT PACKING COMPANY'S Motion for Summary Judgment. *Perkinson v. Manion*, 163 Ill. App. 3d 262, 516 N.E.2d 977, 114 Ill. Dec. 822 (5th Dist. 1987). Leave to appeal to the Supreme Court of Illinois was denied.

STATUTES AND REGULATIONS INVOLVED

49 U.S.C. Section 10526

§10526. Miscellaneous motor carrier transportation exemptions
a) The Interstate Commerce Commission does not have jurisdiction under this subchapter [49 USCS §§ 10521 et seq.] over-

(6) a motor vehicle carrying for compensation, only property and that property consists of-

(A) ordinary livestock;

49 U.S.C. Section 10927

§10927. Security of motor carriers, brokers, and freight forwarders
(a)(1) the Interstate Commerce Commission may issue a certificate or permit to a motor carrier under section 10922 or 10923 of this title [49 USCS § 10922 or 10923] only if the carrier files with the Commission a bond, insurance policy, or other type of security approved by the Commission.

49 U.S.C. Section 10922

§10922. Certificates of motor and water common carriers
(a) Except as provided in this section and section 10930(a) of this title [49 USCS § 10930(a)], the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this ti-

tle [49 USCS §§ 10521 et seq. or 10541 et seq.] as a motor common carrier or water common carrier, respectively, if the Commission finds that . . .

49 U.S.C. Section 11107

§11107. Leased motor vehicles

(a) Except as provided in Section 11101(c) of this title [49 USCS §11101(c)], the Interstate Commerce Commission may require a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] that uses motor vehicles not owned by it to transport property under an arrangement with another party to-

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary of Transportation on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

(b) The Commission shall require, by regulation, that any arrangement, between a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] and any other person, under which such other person is to provide any portion of such transportation by a motor vehicle not owned by the carrier shall specify, in writing, who is responsible for loading and unloading the property onto and from the motor vehicle.

Section 30, Motor Carriers Act of 1980

Minimum financial responsibility for motor carriers. Act July 1, 1980, P.L. 96-296, § 30, 94 Star, 820; Jan. 6, 1983, P.L. 97-424, Title IV, Part A, § 406, 96 Stat. 2158 provides:

(a)(1) The Secretary of Transportation shall establish regulations to require minimal levels of financial responsibility sufficient to satisfy liability amounts to be determined by the Secretary covering public liability, property damage, and environmental restoration for the transportation of property for hire by motor vehicle in the United States from a place in one State to a place in another State, from a place in a State to another place in such State through a place outside of such State, or between a place in a State and a place outside the United States.

(d)(1) Any person (except an employee who acts without knowledge) who is determined by the Secretary, after notice and opportunity for a hearing, to have knowingly violated this section or a regulation issued under this section shall be liable to the United States for civil penalty of not more than $10,000 for each violation and if any such violation is a continuing one each day of violation constitutes a separate offense. The amount of any such penalty shall be assessed by the Secretary by written notice. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, and history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

49 C.F.R. Section 387.1

§387.1 Purpose and Scope.

This part prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their

vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

CORRECTED STATEMENT OF THE CASE

Defendant Manion was the owner of a tractor-trailer involved in a collision with the plaintiffs. (C-470). Manion was requested by Defendant Reelfoot Packing Company (hereinafter referred to as Reelfoot),[1] a packinghouse, to pick up and deliver a load of hogs. (C-436, C-484-486, C-360). Reelfoot owned no trucks for use in the transportation of livestock. (C-412-413). Manion failed to carry liability insurance (C-486, 488).

Plaintiffs have sought relief against Reelfoot in Counts XXIII-XXVII of their Second Amended Complaint on the theory that Reelfoot had a duty under 49 U.S.C. Sections 10927 and 11107 to insure that Manion carried the statutory required minimum insurance (C-562-569). Reelfoot filed a Motion for Summary Judgment as to these counts, which was granted by the trial court (C-333, C-681). While Plaintiffs filed a Notice of Appeal in the Appellate Court of Illinois, Fifth District, on this aspect of the court's order (C-685), they failed to argue this point in their Appellant's brief before the Appellate Court of Illinois, Fifth District, but limited reference to Reelfoot only as to an issue not raised in the Petition for Writ of Certiorari.

The Appellate Court of Illinois, Fifth District, affirmed the trial court's order without reference to plaintiffs' appeal as to Reelfoot on the issues before this Court. The Supreme Court of Illinois denied Plaintiff's Petition for Leave to Appeal.

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[1]Defendant Reelfoot Packing Company is a ficticious name used by Valleydale Packers, Inc. which has no parent company or subsidiaries.

REASONS FOR NOT GRANTING THE WRIT

I.

THE QUESTION PRESENTED BY PLAINTIFFS WAS NOT PROPERLY RAISED SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE JUDGMENT ON WRIT OF CERTIORARI.

Plaintiffs have failed to timely and properly raise their question for review as to Defendant Reelfoot so as to give this Court jurisdiction to review the judgment on a writ of certiorari. The question for review presented to this Court by plaintiffs concerns the applicability of federal statutes and regulations as to defendant Reelfoot. In Counts XXIII-XXVII of the plaintiffs' Second Amended Complaint they relied on 49 U.S.C. Sections 10927 and 11107 for the proposition that defendant Reelfoot had a duty to insure that truckers under its hire carry required minimum insurance. The trial court, after finding no merit to plaintiffs' proposition, granted defendant Reelfoot's motion for summary judgment on this issue.

Plaintiffs argued for the first time in their brief before the Appellate Court of Illinois, Fifth District that liability may be imposed by Section 30 of the Motor Carrier Act of 1980 and the regulations promulgated in support thereof found at 49 CFR Sections 387.1, *et. seq.* However, plaintiffs failed to argue in their brief that these statutes and regulations applied to Reelfoot but only argued that they applied to defendants ILPA. Plaintiffs' failure to argue this issue in their brief constituted a waiver of this point on appeal pursuant to Illinois Supreme Court Rule 341(e)(7). See also *Jenkins v. Wu*, 102 Ill. 2d 468, 468 N.E.2d 162, 82 Ill. Dec. 382 (1984); *Zimring v. Wendrow*, 137 Ill. App. 3d 847, 485 N.E.2d 478, 92 Ill. Dec. 667 (2nd Dist. 1985). The decision of the Appellate Court made no reference to plaintiffs' appeal as to defendant Reelfoot but only discussed this issue as to defendant ILPA.

Since the question for review proposed by the plaintiffs to This Court was not presented in their pleadings in the trial court nor presented on review as to defendant Reelfoot before the Appellate Court of Illinois, Fifth District, which constituted a waiver of this point on appeal under Illinois law, no credible argument can be made that this question is properly before this Court. Furthermore, no attempt was made by plaintiffs to comply with Supreme Court Rule 21.1(h) to show the method or manner of raising these issues in the courts below or the way in which they were passed upon by these courts.

Since the federal question was not timely and properly raised below, this Court is without jurisdiction to review the judgment on a writ of certiorari.

II.

THE INTERSTATE COMMERCE ACT IMPOSES NO DUTY UPON A PARTY WHO CONTRACTS WITH A MOTOR CARRIER TO ASSURE MAINTAINANCE OF MINIMUM LEVELS OF LIABILITY INSURANCE.

If the court finds that it has jurisdiction to review plaintiffs' petition, then the question presented for this Court's review must be addressed. Counts XXIII-XXVII of plaintiffs' Second Amended Complaint seek to impose liability upon defendant Reelfoot under the theory that it had a duty under 49 U.S.C. Sections 10927 and 11107 to insure that independent truckers under its hire carry the statutorily required minimum insurance. Manion was exempt from the jurisdiction of the Interstate Commerce Commission (hereinafter referred to as ICC) under 49 U.S.C. Section 10526(a)(6)(A) which exempts for-hire carriers of livestock.

Plaintiffs seem to argue here that Manion had a duty to maintain minimum insurance under 49 U.S.C. Section 10927 and that Manion's failure to procure liability insurance imposes liability upon Reelfoot by the application of the Illinois

Supreme Court's holding in *Kreider Truck Service, Inc. v. Augustine*, 76 Ill. 2d 535, 394 N.E.2d 1179, 31 Ill. Dec. 802 (Ill., 1979). (No mention is made of Section 10927 in plaintiffs' reason for granting a writ but reference is made to this section in plaintiffs' citation of applicable statutes.) This argument fails under scrutiny of the statutory language and the regulations promulgated in support thereof.

Section 10927 provides that a motor carrier may only receive a certificate from the ICC if it files adequate security with the ICC. However, this requirement only applies to carriers subject to Sections 10922 or 10923 of Title 49. A review of section 10922, which is applicable to motor carriers, reveals that it is applicable only to those motor carriers subject to the jurisdiction of the ICC under Chapter 105 of Title 49 (49 U.S.C. Sections 10521, *et. seq.*) Since Section 10526 exempts livestock carriers from the jurisdiction of the ICC, Section 10927 cannot apply to Manion.

Plaintiffs also argue that this liability may be imposed by the Motor Carrier Act of 1980 and the regulations promulgated in support thereof found in 49 CFR Sections 387.1, *et. seq.* These regulations find their origin in Section 30 of the Motor Carrier Act of 1980, which is uncodified (it can be found after 49 U.S.C. 10927 in USCA and USCS).

Reelfoot recognizes that Section 30 requires for-hire motor carriers to maintain a minimum level of financial responsibility. However, nowhere in the provision is there any indication that one who hires a for-hire motor carrier has a duty to assure compliance with the insurance requirement. An illustration of the lack of intent of the statute to extend a duty to those who hire motor carriers can be found in the regulations promulgated in support of Section 30. Section 387.1 clearly states that minimum levels of insurance are to be maintained by *motor carriers* and that the purpose of the regulations is to give incentive to *motor carriers* to maintain financial responsibility. (Emphasis added).

The complex ICC statutory and regulatory scheme which were addressed in *Kreider Truck Service, Inc. v. Augustine*, 76 Ill. 2d 535, 394 N.E.2d 1179, 31 Ill. Dec. 802 (1979) and *Hershberger v. Home Transport Company*, 103 Ill. App. 3d 348, 431 N.E.2d 72, 59 Ill. Dec. 53 (2nd Dist. 1982), cited by plaintiffs is not present in this case. First, Manion was exempt from the jurisdiction of the ICC under 49 U.S.C. 10526(a)(6)(A). Second, the arrangement between Reelfoot and Manion was not as lessor-lessee, as was the situation in *Kreider* and *Hershberger*. Manion owned, operated and maintained his own truck and the state court determined conclusively that no relationship existed between Manion and Reelfoot which would give rise to any responsibility on the part of Reelfoot.

The duty imposed upon a third party in *Hershberger* and *Kreider* arose from the public policy clearly stated by the United States Congress in the Interstate Commerce Act (49 U.S.C. 10301, *et. seq.*). The United States Congress had the power and opportunity to impose a duty upon those who hire motor carriers in interstate commerce exempt from the jurisdiction of the ICC, but did not do so. Without the necessary statutory language and intent, Reelfoot can be held to no duty to insure Defendant Manion's compliance with Section 30 of the Motor Carrier Safety Act.

The argument espoused here for the first time by plaintiffs did not appear until after Reelfoot had filed its motion for summary judgment directed to plaintiff's complaint and First Amended Complaint. Plaintiffs seek to have this Court create a new requirement not heretofore recognized and impose it retroactively on a defendant not in the business of owning and operating trucks. Even if it could be established that such a duty upon Reelfoot is in the public interest (a considerable leap of faith from the regulations noted), such a decision is not for the courts to impose retroactively in such a tenuous personal injury action, but should be left to the dispassionate exercise of the legitimate legislative and rule making function of the agencies,

commissions and legislative bodies charged with this responsibility.

The statutes involved here and the rules promulgated therefrom are, on their face, not directed to Reelfoot. Reelfoot is not a for-hire carrier and any possible connection between Reelfoot and Manion here involves the transportation of livestock, an excluded occupation under the ICC rules and regulations. To now declare Reelfoot responsible for Manion's conduct more than four years ago based upon a bootstrapped public policy argument would be judicial legislation raised to a frightening degree. The trial court, Appellate Court, and Supreme Court of Illinois considered each of the arguments plaintiffs have put forth here and rejected each of them.

Certainly plaintiffs have failed to show This Court any basis for a finding that the question presented is special and important to justify This Court's exercise of its discretion in granting plaintiffs' petition for writ of certiorari.

CONCLUSION

Plaintiffs have failed to properly present the question presented for review in the courts below and therefore it is not properly before This Court. Even if properly before This Court, plaintiffs have failed to show that the question presented is an important question of federal law that should be settled by This Court or that the question presented is meritorious.

For all the foregoing reasons, Respondents urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-98

Brenda Perkinson, Elizabeth Perkinson, a minor, by her father and next friend, Alex Perkinson; and Alex Perkinson, Administrator of the Estate of Ethel Perkinson, Deceased,

Petitioners,

v.

Monty Manion, Reelfoot Packing Company, a Division of Valley Dale Packers; Interstate Producers Livestock Association, and Jack Scoville, d/b/a Scoville's Tap Room,

Respondents.

PROOF OF SERVICE

STATE OF ILLINOIS)
) ss
COUNTY OF ST. CLAIR)

The undersigned, an employee of the Law Firm of DUNHAM, BOMAN & LESKERA, being first duly sworn, upon oath, state that I personally mailed true and correct copies of the Brief in Opposition to Petitioners' Petition for a Writ of Certiorari by placing the same in an envelope clearly addressed and with sufficient postage, in the U.S. Mail Box in front of 520 First Illinois Bank Building, East St. Louis, Illinois, 62201, at 4:00 p.m. to Richard Shaikewitz, 620 East Third Street, Alton, Illinois, 62002, Madelyn Lamb, P.O. Box 510, Edwardsville, Illinois, 62025, Michael Katz, 1933 Vandalia, Collinsville, Illinois 62234, and Michael Constance, 201 South Illinois, Belleville, Illinois, 62220, on this 12th day of August, 1988.

Subscribed and sworn to before me, a Notary Public, in and for the State of Illinois, County of St. Clair, this 12th day of August, 1988.

_____